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No. 97-1760

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Coastal Petroleum Company,

Petitioner,

v.

Honorable Lawton Chiles, et al., as and Constituting the Board of Trustees of the Internal Improvement Trust Fund, and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

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REPLY BRIEF

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CORPORATE FILER PROVISION

Pursuant to Supreme Court Rule 29.6, Coastal Petroleum Company, as a corporate filer, hereby states that as listed in its Petition for Writ of Certiorari, Coastal Caribbean Oils & Minerals, Ltd. is its parent company.

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REPLY BRIEF

I. Florida's View of this Case Effectively Insulates all State Legislation from Judicial Review under the Takings Clause. Florida's astonishing Brief in Response to Coastal's Petition for Certiorari is as notable for the key points it omits or misstates as it is for the unsound arguments it advances. Respondents view the entire controversy as simply an ordinary contract dispute governed by state law that raises no broad questions of federal constitutional law. Respondents reach that conclusion by multiple errors. They first misstate

the procedural posture of the case. Next they misstate the effect of the 1976 Memorandum of Settlement between Coastal and Florida. Last they misread the public trust doctrine to make Coastal's royalty interest revocable at the will of the state. If Respondents correctly characterize this case, then the actions of state legislatures are always immune from examination under the Takings Clause of the United States Constitution. Any interest in private property is subject to confiscation through a redefinition and the explicit protection of property rights is read out of the Constitution.

That broad proposition cannot possibly stand. Its most recent refutation is found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), which struck down state land use restrictions on state-created fee simple interests in land because they deprived the land of all viable economic use without showing that the landowner's conduct (the building of an ordinary single-family beachfront home, no less) constituted a common law nuisance. Yet this case in many ways reveals brazen state behavior toward Petitioner's royalty interest which is far more aggressive than the state land use regulation struck down in *Lucas*. In *Lucas* the state regulation at least allowed the landowner to keep possession of his land. But royalty interests are intangible real property, so the refusal to lease wipes out the last scintilla of benefit to Coastal. In this case, Florida claims it has taken nothing when in fact it has left nothing. *Lucas* is not merely a case about land. It is a case about the protection that is given to all holders of private property, including royalties vested under state law.

II. Respondents' Responsive Brief Ignores or Misstates Every Federal Issue in the Case. A close examination of Respondents' Brief shows that they rely on procedural and substantive arguments that are manifestly inconsistent with the Constitution of the United States.

A. Florida Confuses the Question of the Legal Status of a Royalty Interest with its Valuation in this Particular Case. Florida's initial mistake is to pass over without a single mention the bifurcation agreement acknowledged by the trial court (App., at p. 13) under which the only issue at stake in the first phase of the trial was the status of a royalty interest, as opposed to the particular value of this interest. See Petitioner's Brief at 6. Petitioner agreed not to introduce any evidence as to the value of its royalty interest until the status of its interest was determined. Petitioner remains eager to introduce the full range of geological and economic evidence to demonstrate the enormous value of its royalty. Royalty interests are created for long periods of time and benefit from development of new information and technical advances. At the time Ch. 90-72, Laws of Florida, became law in 1990, Coastal had 26 more years to profit from exploration and development.

Nothing in the present record establishes that the market value of Coastal's royalty is zero. Florida makes it appear as though a trial was had on the issue of valuation when it writes "those courts also found, as a matter of fact, the royalty area had no prospect of containing oil in commercial quantities." Respondents' Brief at 10. But Coastal has not received any opportunity to present evidence to rebut that conclusion, which, as the basis of the judgment below, counts as a per se violation of the most elementary principles of procedural due process: a fact cannot be decided against a party who has not been allowed to present evidence on its own behalf. Coastal's royalty cannot simply be taken for lack of value when value had not even been addressed.

B. Florida Suppresses Any Reference to the Standard Good Faith Leasing Obligations Binding on it in this Case. The second fundamental mistake in Florida's response is its

effort to marginalize fundamental issues in this case by referring to its ostensible "unusual facts" [Respondents' Brief at 2, 6] which show "that the particular interest allegedly taken was not 'property' under Florida law." *Id.* at 6. See also, *Id.* at 7. In its view the trial court was correct in finding "that the settlement agreement did not imply a condition that the State would lease land within the royalty area." *Id.* at 3.

What is so ironic about Florida's position is that it relies on the Court's decision in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984). Respondents' Brief at 7. The quoted passage notes that "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." (emphasis supplied). In *Monsanto*, that proposition was held to mean that the general principles of state trade secret law governed the definition of property interests. In this case it should imply that general principles of state law determine the scope of another intangible interest of sorts, Coastal's royalty. But Florida in this case has consistently disdained its general preexisting rules. Instead, Florida seeks to lift itself by its own bootstraps. It treats as the dispositive rule of property law, the aberrant outcome of the very proceeding it uses to extinguish Petitioner's royalty interest. It utterly fails to point to any prior precedent to support its position, let alone precedents which are "objectively reasonable."

More concretely, nowhere in their Brief do Respondents so much as mention the standard good faith obligations imposed on all owners of property who have conveyed out a royalty interest, or explain why that obligation should be suppressed only in this particular case. The State does so in the teeth of unambiguous state legal authority that protects all royalty interests in Florida law notwithstanding their inherently speculative value. See

Conway Land, Inc. v. Terry, 542 So. 2d 362, 365 (Fla. 1989); *Welles v. Berry*, 434 So 2d 982 (Fla. App 1983).

The well-nigh universal good faith obligation is read into all royalty agreements. Its implication stems from the need to counteract the recurrent conflict of interest between fee owner and royalty holder. Only that obligation prevents the fee owner from doing nothing at all to lease the land. That risk of abuse is as potent with Florida as with any private landowner, yet Florida would have this Court believe that Coastal had signed on to the 1976 settlement knowing that it allowed Florida to close down all activities in the royalty area. No one knew in 1976 if the State would lease those lands in which Coastal had relinquished all rights. But, the whole point of the settlement was to cut Coastal's interest in the royalty area in half, not to extinguish it altogether as in the released areas. See map, App., at p. 55. The basic split in the take from the royalty lands therefore makes perfectly good sense only if the State is bound by the incontrovertible good faith obligations on landowners who have created a royalty interest.

At this juncture Florida's argument thus reduces to the proposition that its own courts can allow it to keep the sweet but escape the bitter of its own solemn agreements. Its opportunistic reinvention of oil and gas law shows the importance of affirming Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 298 (1967): "The prohibition against taking private property for public use without just compensation forbids uncompensated confiscation by the judicial and executive branches as by the legislature." L. Tribe, American Constitution Law, p. 589, n. 7, (1988).

C. Florida's Concept of "Property" is Inconsistent With the Takings Clause. Florida next claims that "the

particular interest allegedly taken was not property under Florida law." Respondents' Brief at 6, see also p.2 (emphasis supplied). The role of state common law in interpreting the application of the Fifth Amendment is significant here, but not in the way advanced by Florida.

As discussed, this Court has traditionally resorted to existing rules or understandings that stem from an independent source such as state common law to define the range of interests that qualify for protection as property under the Fifth and Fourteenth Amendments. *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701, 2709 (1972) (emphasis supplied). Florida overlooks the concept of "existing" rules and understandings and is, instead, suggesting that the State's own decisions in the same proceeding is the rule which may be used to establish that Coastal's royalty interest does not qualify for protection under the Takings Clause.

Florida has not pointed to a single decision, other than the rulings made in the instant proceeding, which in any way establish that Coastal's royalty interest does not qualify for protection under the Fifth and Fourteenth Amendments. Furthermore, the public trust doctrine as codified in Article X, § 11 of the Florida Constitution does not address whether Coastal's royalty interest qualifies for protection under the Taking Clause or even whether a conveyance of an interest in lands under navigable waters, when authorized by law, is somehow not subject to the protection of the Takings Clause.

In *Lucas*, 112 S.Ct. at 2900, this Court, in discussing the role of the common law in a Takings case, ruled that the limitation on use "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Florida's limitations against use of Coastal's property is both

newly legislated and newly decreed, and thus cannot pass this test.

Moreover, in *Lucas*, the Court stresses that the background principles of private law should not be subject to infinite manipulation:

> We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

Florida has ignored this explicit warning in this case. It has cited no relevant precedents to show that Coastal's royalty was already excluded from beneficial use under Florida law, and instead has attempted to manipulate this principle by claiming that "[u]nder the unusual facts of this case, the decisions of the state courts [in the instant case] must be read as a determination that Coastal's particular interest was not property under Florida law, or if property, not an interest protected by the U.S. Constitution." Respondents' Brief at 7. Florida has not even attempted to justify the decision below based on background principles of state law. Instead, Florida would bootstrap the decision below into relevant precedent to justify the total taking of Coastal's royalty.

D. Florida Wrongly Asserts that Its Public Trust Doctrine Allows It to Nullify This Conveyance on Submerged Lands at Its Own Will. Florida's last foray into legal self-denial comes from its assertion that Ch. 90-72, Laws of Florida, which bans future oil and gas drilling throughout Florida's Gulf waters, is nothing more than a codification of its prior "public trust doctrine" that treats all submerged lands

as being held in public trust. Once again it relies on the proposition that the "public trust doctrine is an existing rule or understanding" within the meaning of *Monsanto*. Respondents' Brief at 9. It is therefore instructive that the State's brief nowhere quotes the language of the Florida Constitution that purports to give it the right to revoke whatever grants and settlements it chooses just because it wants to. Here Article X, § 11 of the Florida Constitution does nothing to bar the sale of public lands, but explicitly authorizes them: "Sale of such [public trust] lands may be authorized by law, but only when in the public interest." It is this existing rule that controls.

The only question is when that determination of the public interest can be made. Florida will not say so explicitly, but it thinks that it can revise its own view on the public interest as many times as it pleases without paying compensation for any property destroyed in the process. In this case, the public interest determination was made by the Florida legislature in 1944.[1] Next the State sought to rescind the lease in litigation that it lost in state court in 1945. *Watson v. Holland*, 20 So.2d 388 (Fla. 1945). It then sought to rescind the lease in litigation initiated in federal court in 1968 from which the 1976 federal settlement derived.[2] In its

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[1] Both the Leases and the Memorandum of Settlement were expressly determined by the State to be in the best interest of the State. The State cites *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990), for the proposition that it may rescind interests in public land without compensation, however as Respondents' Brief recognizes, this case concerns proprietary action, not regulatory action concerning a permit such as in *Marine One*.

[2] Coastal's royalty was created by the 1976 Consent Decree of the United States District Court in and for the Southern District of Florida, Miami Division, incorporating the Memorandum of Settlement. *Coastal Petroleum Co. v. Sec. of Army*, 536 F.2d 1030 (5th Cir. 1976). That final decision modified the unpublished interlocutory order cited by

view, Florida in this particular setting is not bound by the usual principles of res judicata. Three bites at the apple are apparently not enough.

The real principle in this case should be "enough is enough." Florida, or any other state, should not be allowed to wipe out a royalty interest of immense value by pretending that its own public trust doctrine prohibits binding grants of interests in real property (of which a royalty interest is one). No one says that the State cannot introduce sensible conditions to prevent oil leakage and spillage; or that it can condemn the royalty interest for fair value. What this case does raise is the most fundamental question of limited government: may the State take by artifice and declaration property interests that it has validly created in others simply because its legislature, executive and courts want them very much?

Respondents (*Coastal Petroleum Co. v. Sec. of Army*, case nos. 68-951-Civ-CA & 69-699-Civ-CA (S.D. Fla. Feb. 5, 1971)) by providing that no compensation would be required for the State to "use" minerals "other than oil and gas" for a public purpose. (App., at p.50) (emphasis supplied).

CONCLUSION

Certiorari should be granted to review the judgment of the First District Court of Appeal, State of Florida in *Coastal Petroleum Company v. Honorable Lawton Chiles, et al.*, 701 So. 2d 619 (Fla. 1st DCA 1997).

Respectfully submitted,

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